# 82-1923



IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1982
No. _____

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STATE OF CALIFORNIA,

Petitioner,

v.

JOHN WALTER CARROLL,

Respondent.

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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

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## QUESTION PRESENTED

Whether a state criminal defendant who elects to represent himself and is disruptive may be excluded from the courtroom where the disruption is not violent and other possible remedies are not realistically viable?

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## INTRODUCTION

Petitioner, State of California, respectfully requests that this Honorable Court grant this Petition for Writ of Certiorari in which petitioner seeks review of the judgment of the Court of Appeal of the State of California filed February 23, 1983, reversing the judgment of the trial court and on which hearing was denied by the Supreme Court of the State of California on April 20, 1983.

## OPINIONS BELOW

On February 23, 1983, Division Three of the Court of Appeal of the State of California, Second Appellate District, rendered an opinion regarding the judgment of first degree murder entered by the Superior Court of the State of California for Los Angeles County, the trial court. The opinion is reported in the official

advance sheets at 140 Cal.App.3d 1, 35, 189 Cal.Rptr. 327, and is attached hereto as Appendix A.

Petitioner, State of California, sought a rehearing which was denied without opinion by the Court of Appeal on March 21, 1983. A copy of the order denying the rehearing is attached as Appendix B. Thereafter, petitioner, State of California, filed a petition for hearing in the Supreme Court of the State of California. The petition for hearing was denied on April 20, 1983. A copy of the order denying hearing appears at Appendix C of this Petition for Writ of Certiorari.

The California Court of Appeal issued a stay of the proceedings to permit the filing by the People of the State of California of the within petition for writ of certiorari to this Honorable Court. A

copy of the stay is attached hereto as Appendix D.

## JURISDICTION

The final decision of the Court of Appeal of the State of California was filed on February 23, 1983. Thereafter, petitioner, State of California, filed a timely petition for hearing in the Supreme Court of the State of California within the meaning of 28 U.S. Code section 2201(d) which petition was denied on April 20, 1983. A copy of the order denying hearing is attached as Appendix B.

Petitioner invokes the jurisdiction of this Court to review this decision under 28 U.S. Code section 1257(3).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VI, reads as follows:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 187 of the California Penal Code reads as follows:

"(a) Murder is the unlawful killing of a human being, or a

fetus, with malice aforethought.

"(b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

"(1) The act complied with the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.

"(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although

not medically certain, would be substantially certain or more likely than not.

"(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus.

"(c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law."

## STATEMENT OF THE CASE, FACTS AND PROCEDURAL BACKGROUND

The statement of the case, facts and procedural background are taken from the opinion of the California Court of Appeal in People v. Carroll, 140 Cal.App.3d 135, 136-141, 189 Cal.Rptr. 327, 327-330 (Appendix A, pp. 51-80), as follows:

"John Carroll has appealed his conviction of first degree

murder (Pen. Code, § 187).

"This is a case in which defendant exercised his right to represent himself at trial and, during the People's case, was, from time to time, excluded from the courtroom by court order for conduct which the court considered unacceptable. During these periods of exclusion, no defense counsel was present in the courtroom, and it does not appear that defendant had even such access to the proceedings as could have been provided by electronic means.

"Proceeding with trial, under the circumstances of this case, in the total absence of defendant or counsel for the defense, was

error. The kind of error which occurred in this case is so fundamental that it goes to the essence of a fair trial. Accordingly, we must reverse and remand for a new trial.

"FACTS

"Defendant had been living for about six months in an apartment in Long Beach with victim and her two children aged 10 and 11 years. On August 10, 1980, a Sunday, an argument began between defendant and victim. Defendant began to hit her, and the two went into the bedroom. The children could hear an altercation taking place in the bedroom between defendant and the victim, which continued into the

night, and the next day. When the children returned from summer school the next day, the bedroom door was closed, and defendant would not let them go in. Defendant left the apartment, taking the children with him, and left them at someone's house. Walter Carroll, defendant's cousin, testified that on Monday, August 11, 1980, he took defendant to the airport, where he caught a plane to Little Rock, Arkansas, before midnight.

"On August 14, when the children and a neighbor saw victim's body in the apartment through a window, the police were called. The police officers found victim's body on the bedroom

floor. She was determined to have died of multiple injuries which could not have been self-inflicted. No drugs or narcotics were found in her body.

"Defendant's cellmate from March of 1981 testified that defendant had told him that victim 'was just a slut' and that he 'had to kill her.'

"THE TRIAL

"The public defender was appointed to represent defendant on March 24, 1981.

"On May 14, 1981, defendant's motion to relieve the public defender and appoint private counsel was made and denied. Defendant then said that he preferred to represent himself

rather than have the public defender as counsel. The judge extensively questioned him about this. Defendant said that he had a high school equivalency certificate and a welding certificate, had been employed as a truck driver and a welder, and had once sat through a criminal jury trial.

"The court advised him that an experienced public defender would be appointed and recommended that he not represent himself. The court also told him that he was making a mistake, and that he was being granted pro per status with great reluctance. A written form detailing the problems with waiving counsel was read to

defendant, and he was questioned about it in open court.

"Defendant was also told that he could change his mind 'in the near future; that is, within a week,' and accept appointed counsel, but that if he changed his mind on the day of trial or during trial, the court would not delay the proceedings to appoint counsel.

"On September 14, 1981, when the case was called for motions and trial, defendant moved, on the basis of a written motion he had filed, for appointment of co-counsel, and the court informed him that he had a right to appointed counsel, but not to co-counsel. Defendant also moved

again orally to appoint a private attorney, but not the public defender, with the allegation that the public defender had represented the victim and a confidential informant before. The court denied defendant's motion for appointment of co-counsel and ruled that because it was made one day before trial, defendant's request for appointment of counsel was made too late.

"On September 15, 1981, defendant told the judge that he wanted counsel appointed because he was incompetent to represent himself. He also requested a continuance. The court denied defendant's request for a

continuance because it was his fifth continuance; defendant had failed to make diligent use of his appointed investigator; and the victim's two children had already been flown in from New York as witnesses. The court then denied the motion for appointed counsel on the ground that the motion was untimely and had been made for purposes of further delay when all other methods of delay had failed.

"Jury selection then began.

"The record of September 15, 1981, reflects that defendant was not present for all of the jury selection. The minute order states that defendant was removed 'at his own request and with the court's order in that the

defendant continues to disrupt the proceedings.'

"The record reflects that on the morning of September 16, 1981, while defendant was still absent, the court appointed an attorney solely to advise defendant about jury voir dire and to urge him to attend the trial. That attorney performed that function, but did not appear again in this proceeding.

"Defendant returned to court for part of the jury selection. Out of the presence of the jury, the court advised defendant that he would not be forced to attend the trial. Defendant said that he had never intended to waive his right to appointed counsel and

again stated that he requested to be represented by a lawyer. He was physically removed from the courtroom, later that morning, while jury selection continued. The trial court said that he had been removed for 'disrupting the jury.'

"Defendant was brought back to the courtroom after the jury had been sworn.

"The court advised defendant as follows:

"'As indicated, you are entitled to represent yourself throughout the course of trial, should you desire. If you start making statements, disrupting the trial, the court will have to have you removed. The court will not

physically force you to stay in trial. The court will physically remove [sic], though, if you disrupt the course of the trial.'

"Defendant maintained that he had been trying to tell the court that he was not competent to represent himself when he had been removed.

"Also on the morning of September 16, 1981, when defendant was given the opportunity to make an opening statement, he again stated that he was not competent to represent himself, and the court told him that he would be removed unless he confined his statement to the evidence. Defendant did not so confine his statement and was again removed

from the courtroom.[1/]

"For the remainder of the morning of September 16, 1981,

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"1. The following colloquy took place:

"'THE COURT: Mr. Carroll, you have the opportunity to make an opening statement, which would mean what you would expect any witnesses to testify to. [¶] 'THE DEFENDANT: Your Honor, I would try. I will attempt. First of all, I would like for the jury to know that I am not competent to represent myself. My motion to relieve myself as counsel was timely made. [¶] 'THE COURT: All right. Mr. Carroll, we are going to have to remove you from

Dr. Sharon I. Schnittker, deputy medical examiner, testified to her

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the courtroom. You have the opportunity to make an opening statement. But you cannot tell the jury something that is irrelevant and does not relate to the evidence. [¶] 'THE DEFENDANT: May the record reflect that the defendant is being physically removed from the courtroom. [¶] 'THE COURT: You will not be physically removed, if you wish to make a proper opening statement to the jury. But you are not going to make a statement on something that is completely irrelevant to the charge. [¶] 'THE DEFENDANT: May the record

findings as to the cause of victim's death, with defendant

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reflect that the defendant has been excused by the judge. [¶] 'THE COURT: Not necessarily. The court says you can make an opening statement. But you only make an opening statement as to the evidence. You do not make it on the basis of something that's irrelevant to the charge. If you start again to read something that's irrelevant, the court will have to remove you. Because this trial has to proceed. You used every possible means to delay the trial. You still are doing so. Now, if you wish to make an opening statement, that you may.

absent. At the beginning of the afternoon session, defendant was

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But if you start making a statement, something that's not relevant to the charge, then, in that event, the court will have to have you physically removed. [¶] 'THE DEFENDANT: Your Honor, I would like for the jury to know that the defendant was never served any papers as to what time this person died. A date or anything of this. [¶] 'THE COURT: Would you please remove the defendant. [¶] 'THE DEFENDANT: And I wasn't even in town at the time. I was out of town. And I don't know anything about it. May the record reflect that defendant

brought back into the courtroom. Out of the presence of the jury, the court again advised defendant that he had a right to be present. Dr. Schnittker testified further, and when defendant was offered an opportunity to question her, defendant again announced that he wanted a court-appointed attorney and was removed.[2/]

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is being physically removed from the courtroom. [¶] 'THE COURT: The record will so indicate, with pleasure.'

"2. The record reflects the following colloquy:

"'THE DEFENDANT: Due to my lack of understanding of legal terms, I was not aware -- I was

"In defendant's absence, the neighbor who had discovered the corpse testified that defendant had lived in the apartment; he described the discovery of the body. He was not cross-examined,

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not asked to give up my pro per status to be fully represented by court-appointed attorney and -- [¶] 'THE COURT: Mr. Carroll, the court will have to remove you if -- [¶] 'THE DEFENDANT: I was not allowed to -- [¶] 'THE COURT: Please remove Mr. Carroll. [¶] 'THE DEFENDANT: May the record reflect that the defendant is being physically removed from the court. [¶] 'THE COURT: The record will so reflect.'

because defendant was still out of the courtroom.

"Defendant was also absent while the victim's son testified, but defendant was brought into the courtroom so that the son could identify him. While defendant was in the courtroom, the court asked him whether he wanted to cross-examine the witness. Defendant declined on the ground that he was not competent to represent himself. He also declined, on that ground, to cross-examine the victim's daughter, even though he had returned to the courtroom for her testimony.

"For the remainder of the trial, defendant remained in the courtroom and cross-examined the

other witnesses, including the police officer who was called to the scene, a police criminalist, a police homicide detail officer, and defendant's former cellmate. During cross-examination of these witnesses, defendant said that he was incompetent to represent himself and had asked for counsel or co-counsel to be appointed.

"Defendant moved during the defense case to have another inmate of the county jail appointed as co-counsel, and this motion was denied, outside the presence of the jury.

"As part of defendant's case, he moved to call the trial judge as a witness, but that motion was denied after a hearing before

another judge. Defendant called jail inmates to the stand in an attempt to elicit testimony that he had never told these witnesses that he had committed the crime. He called various prosecution witnesses, including Dr. Schnittker, the medical examiner. He also called the police criminalist, the homicide officer, and Walter Carroll. Defendant made his argument before the jury, and the jury returned its verdict of guilty. On October 16, 1981, defendant's motion to have counsel appointed for the sentencing hearing was denied."

* * * * * *

## SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari in this case should be granted because the issues raised in this case are of extreme importance to trial judges throughout the nation. Important questions are raised as to what actions a trial judge should take if a criminal defendant, who elected to assert his federal constitutional right of self-representation, becomes disruptive but not in a violent manner. The opinion of the California Court of Appeal holds that exclusion from the courtroom may not be a remedy under such circumstances but in doing so, it has possibly created a "Faretta sabotage defense." Unfortunately, the opinion of the California Court of Appeal places a tremendous burden on trial judges since other possible remedies relative to disruptive activities by

persons electing to represent themselves without counsel, such as termination of self-representation, contempt proceedings or use of restraints, are not always realistic alternatives. The trial judge under such circumstances in his broad discretion should be allowed to decide which remedy will be applied. Therefore an opinion on this important issue is very much needed for the guidance of all trial courts throughout the nation.

## ARGUMENT

### THE OPINION OF THE CALIFORNIA COURT OF APPEAL HAS, IN EFFECT, CREATED THE CLIMATE FOR A "FARETTA SABOTAGE DEFENSE" IN THAT IT LIMITS SANCTIONS AGAINST DEFENDANTS WHO ELECT TO REPRESENT THEMSELVES AND WHO ARE REPEATEDLY DISRUPTIVE IN A NON-VIOLENT MANNER

The opinion of the Court of Appeal, in

effect, has created the climate for a "Faretta sabotage defense" wherein a criminal defendant who asserts his constitutional right to self-representation may not be excluded from the courtroom if his disruptive activity does not amount to violence.

Under Faretta v. California (1975) 422 U.S. 806, a criminal defendant has an absolute right to represent himself without counsel if he knowingly and intelligently elects to do so. The Court of Appeal's opinion in this case, however, holds that if a defendant asserts his constitutional right to self-representation and if he is disruptive in a non-violent manner, he cannot be excluded from the courtroom but, rather, other remedies such as termination of self-representation and appointment of counsel, contempt proceedings or restraints

should be utilized. (Appendix A, pp. 51-80; People v. Carroll, 140 Cal.App.3d 135, 142, 189 Cal.Rptr. 327, 331.) However, as will be discussed, other alternatives are not always realistic and viable, and the choice of the remedy when a defendant becomes disruptive, even in a non-violent manner, should be within the broad discretion of the trial judge when that criminal defendant represents himself in propria persona.

Unfortunately, this case represents a classic situation of a criminal defendant who attempts to use his constitutional right of self-representation in an attempt to disrupt the proceedings in hopes of injecting error for reversal on appeal. The case against respondent Carroll, relative to the torture-murder of the victim, was exceedingly strong and

therefore it appears that as to respondent Carroll his only ploy for success was to seek to represent himself in an attempt to disrupt the proceedings so as to inject possible error for possible appellate relief in the future. It is urged that respondent Carroll should not be able to benefit from this course of conduct. In fact respondent Carroll, at one point, candidly stated, ". . . my appeal will be done -- will be done by a professional. It seems a tremendous waste of time and money to force me to trial. Then have my case overturned. Then come back and do it again right." (R.T. p. 86.) Furthermore the trial judge, at one point in the proceedings, aptly noted, "The record will reflect that Defendant is dumb like a fox." (R.T. p. 270.)

The history of respondent Carroll's abuse of the court system has been

discussed at length in the quotations from the opinion of the Court of Appeal in the Statement of the Case and need not be repeated here. Needless to say, the record as a whole as reflected by the opinion of the California appellate court shows that respondent Carroll was purposely being obstreperous in an attempt to sabotage a trial in which the prosecution's case against him was overwhelming. Respondent Carroll was repeatedly obstreperous in an attempt to disrupt the proceedings and sabotage the matter so that the trial judge properly excluded respondent Carroll from these proceedings within his discretion in various portions of the trial. (Mayberry v. Pennsylvania (1971) 400 U.S. 455, 463; Illinois v. Allen, 397 U.S. 337, 342-343.) This was because there was a waiver of a right to confrontation by a disruptive

conduct. The record reflects a course of conduct by respondent Carroll in which he purposely blurted out inadmissible and improper matter before the jury in an attempt to set the whole proceedings awry. In 1975 this Honorable Court held in Faretta v. California, supra, 422 U.S. 806, that a criminal defendant has an absolute right to represent himself without counsel if he knowingly and intelligently waives his right to counsel. The Court of Appeal properly noted that:

> "We do not intend, with this opinion, to put into the hands of defendants a tool by which they can exercise their rights under Faretta v. California, supra, 422 U.S. 806, to represent themselves and then become disruptive, securing their exclusion from the

courtroom and automatic reversal. . . ." (Appendix A, p. 70; People v. Carroll, supra, 140 Cal.App.3d at p. 142, 189 Cal.Rptr. at p. 331.)

However, it is respectfully submitted that the effect of the opinion of the California Court of Appeal is to do exactly that.

As noted, both respondent Carroll and the trial judge recognized that respondent Carroll's disruptive tactics were solely for the purpose of gaining a reversal of the conviction in what would otherwise be an extremely strong case.

The Court of Appeal noted that respondent Carroll's disruptive activity, while not violent, was "annoying, provocative, and somewhat disruptive" and that it was a "repeated insistence on appointment of counsel." (Appendix A,

pp. 76, 79; People v. Carroll, supra, 140 Cal.App.3d at p. 143, 189 Cal.Rptr. at p. 332.) However, the effect of the opinion of the California Court of Appeal is to put a trial judge in an impossible situation. When a defendant has elected to represent himself under Faretta, he has an absolute right to do so. If a defendant becomes disruptive while representing himself but is not so in a violent manner, then the trial judge's dilemma is manifest. The Court of Appeal noted that perhaps counsel could have been appointed when respondent Carroll became disruptive. However, once a defendant proceeds to trial representing himself, he no longer has a right to an attorney being appointed since he has waived his right to counsel. It is true that a trial judge, within his discretion, may appoint a standby counsel to take over

a case when a defendant elects to represent himself. (Faretta v. California, supra, 422 U.S. 806, 834-835 fn.46; Mayberry v. Pennsylvania, supra, 400 U.S. 455, 467-468 (Burger, C. J. concurring.) However, while a trial judge may have the power to appoint standby counsel, there would be no constitutional mandate that he do so when a defendant waives his right to a lawyer and elects to represent himself in a criminal prosecution.

As the Federal Court of Appeals for the Ninth Circuit stated in United States v. Halbert (9th Cir. 1981) 640 F.2d 1000, 1009-1010:

> "Halbert also argues that he was denied his Sixth Amendment right to represent himself when the trial judge denied his motion to appear as his own attorney in

addition to his retained counsel. While effective legal counsel is an essential right found in the Sixth Amendment, and the right to appear pro se is guaranteed by 28 U.S.C. § 1654, Faretta v. California, 422 U.S. 806, 812-36, 95 S.Ct. 2525, 2529-41, 45 L.Ed.2d 562 (1975), the two rights are disjunctive. A criminal defendant does not have an absolute right to both self-representation and the assistance of counsel. United States v. Klee, 494 F.2d 394, 396-97 (9th Cir.), cert. denied, 419 U.S. 835, 95 S.Ct. 62, 42 L.Ed.2d 61 (1974); Duke v. United States, 255 F.2d 721, 725-26 (9th Cir.), cert. denied, 357 U.S. 920, 78 S.Ct. 1361, 2 L.Ed.2d 1365

(1958); United States v. Daniels, 572 F.2d 535, 540 (5th Cir. 1978); United States v. Sacco, 571 F.2d 791, 793 (4th Cir.), cert. denied, 435 U.S. 999, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978); United States v. Cyphers, 556 F.2d 630, 634 (2d Cir.), cert. denied, 431 U.S. 972, 97 S.Ct. 2937, 53 L.Ed.2d 1070 (1977). Whether to allow hybrid representation remains within the sound discretion of the trial judge. United States v. Daniels, 572 F.2d at 540; United States v. Wilson, 556 F.2d 1177, 1178 (4th Cir.), cert. denied, 434 U.S. 986, 98 S.Ct. 614, 54 L.Ed.2d 481 (1977); United States v. Pinkey, 548 F.2d 305, 310 (10th Cir. 1977); United States v. Bennett,

539 F.2d 45, 49 (10th Cir.), cert. denied, 429 U.S. 925, 97 S.Ct. 327, 50 L.Ed.2d 293 (1976). Here, the trial judge did not abuse his discretion in refusing Halbert's motion for self-representation."

Therefore, if a defendant represents himself after having knowingly and intelligently waived counsel, and in the beginning of or in the course of trial changes his mind and wants an attorney, and the trial judge, within his discretion, refuses a lawyer, to force the trial judge to give the criminal defendant counsel because he is being disruptive and repeatedly requesting a lawyer would infringe on the judge's discretion. It would appear incongruous to reward a criminal defendant, who is being disruptive

and asking for counsel when he has no right to have a lawyer, with an attorney.

Secondly, there is a problem of bringing a lawyer into a lawsuit at the beginning or middle of a trial because of his lack of familiarity with the facts of the case or the inability of that lawyer to be able to argue the credibility of witnesses if that attorney has not personally had a chance to examine the witnesses or would need additional time to prepare. Thus, to force an attorney in such an impossible position might make that lawyer, as a matter of law, ineffective.

A threat of possible contempt proceedings is also unrealistic. In this particular case, respondent Carroll was charged with first degree murder so that facing a possible life sentence, the threat of contempt would become meaningless. The

use of restraints would also not be realistic since the utilization of chains or shackles, when a defendant elects to go in propria persona, may hamper his effective right of self-representation. As such, the alternatives to exclusion from trial when a criminal defendant is disruptive but not in a violent manner, are really quite limited and as such, the trial judge should be given the responsibility, within his broad discretion, of making the determination of which remedy will be applied. In this particular case, since there is no doubt that respondent Carroll was intending to inject reversible error in an otherwise extremely strong case, the trial judge's actions in partial exclusion were entirely correct.

As this Court noted in Faretta v. California, supra, 422 U.S. 806, 834-835

fn.46, in pertinent part:

> ". . . . We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. See Illinois v. Allen, 397 U. S. 337. . . ."[1/]

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1. In this same footnote, this Court noted that a trial judge could, within his discretion, appoint "standby counsel" to

In Badger v. Cardwell (9th Cir. 1978) 587 F.2d 968, 979, it was stated:

> "In the simplest terms, the Constitution calls upon a trial court faced with a defendant who is representing himself, and who is misbehaving, to ask two questions. Can there be a fair and efficient trial so long as the

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aid the accused. However, as has been discussed, there would be no constitutional right to such "standby counsel." Therefore, it would appear that a defendant who deliberately engages in serious and obstructionist misconduct, even if he represents himself, could by reason of the citation of Illinois v. Allen by this Court in Faretta, be excluded from the courtroom.

> defendant plays the role of attorney. Can there be a fair and efficient trial while the defendant remains in the courtroom? The requirement that both questions be asked is the unremarkable result of the defendant's concurrent exercise of two constitutional rights. In many cases the answers to these questions will be the same. Where only the representation right has been waived, however, the defendant must be permitted to remain in the courtroom--on the understanding and condition that further misconduct may indeed waive his right to be present."

Thus, there is recognition in the Badger opinion that there may be circumstances in

which a person representing himself in propria persona could, by reason of his actions, be excluded from the courtroom.

As such, it is urged that respondent Carroll should not benefit from his disruptive activity and should not be able to avail himself of any "Faretta sabotage defense."

* * * * * *

## CONCLUSION

For the foregoing reasons, it is respectfully requested that a writ of certiorari issue in this case to resolve these important issues and that thereafter this Honorable Court reverse the judgment of the California Court of Appeal.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California

S. CLARK MOORE,
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Deputy Attorney General

HOWARD J. SCHWAB,
Deputy Attorney General
and Attorney of Record

Attorneys for Petitioner

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | | |
|---|---|---|
| THE PEOPLE, | ) | 2d Crim. No. 41330 |
| | ) | |
| Plaintiff and Respondent, | ) | Super. Ct. No. A022036 |
| | ) | |
| v. | ) | COURT OF APPEAL-SECOND DIST. |
| | ) | |
| JOHN WALTER CARROLL, | ) | FILED FEB. 23, 1983 |
| | ) | |
| Defendant and Appellant. | ) | CLAY ROBBINS, JR. Clerk |
| | ) | |
| | | Deputy Clerk |

APPEAL from a judgment of the Superior Court of the County of Los Angeles. Pat Mullendore, Judge. Reversed.

Russell Iungerich, under appointment by the Court of Appeal, for Defendant and Appellant.

George Deukmejian, Attorney General; Robert H. Philibosian, Chief Assistant Attorney General;

S. Clark Moore, Assistant Attorney General; Norman H. Sokolow and Howard J. Schwab, Deputy Attorneys General; for Plaintiff and Respondent.

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John Carroll has appealed his conviction of first degree murder (Pen. Code, § 187).

This is a case in which defendant exercised his right to represent himself at trial and, during the People's case, was, from time to time, excluded from the courtroom by court order for conduct which the court considered unacceptable. During these periods of exclusion, no defense counsel was present in the courtroom, and it does not appear that defendant had even such access to the proceedings as could have been provided by electronic means.

Proceeding with trial, under the circumstances of this case, in the total absence of defendant or counsel for the defense, was error. The kind of error which occurred in this case is so fundamental

that it goes to the essence of a fair trial. Accordingly, we must reverse and remand for a new trial.

FACTS

Defendant had been living for about six months in an apartment in Long Beach with victim and her two children aged 10 and 11 years. On August 10, 1980, a Sunday, an argument began between defendant and victim. Defendant began to hit her, and the two went into the bedroom. The children could hear an altercation taking place in the bedroom between defendant and the victim, which continued into the night, and the next day. When the children returned from summer school the next day, the bedroom door was closed, and defendant would not let them go in. Defendant left the apartment, taking the children with him, and left them at someone's house. Walter Carroll, defendant's cousin, testified that on Monday, August 11, 1980, he took defendant to the airport, where he caught a

plane to Little Rock, Arkansas, before midnight.

On August 14, when the children and a neighbor saw victim's body in the apartment through a window, the police were called. The police officers found victim's body on the bedroom floor. She was determined to have died of multiple injuries which could not have been self-inflicted. No drugs or narcotics were found in her body.

Defendant's cellmate from March of 1981 testified that defendant had told him that victim "was just a slut" and that he "had to kill her."

THE TRIAL

The public defender was appointed to represent defendant on March 24, 1981.

On May 14, 1981, defendant's motion to relieve the public defender and appoint private counsel was made and denied. Defendant then said that he preferred to represent himself rather than have the public defender as counsel. The judge extensively questioned him about this. Defendant said that he

had a high school equivalency certificate and a welding certificate, had been employed as a truck driver and a welder, and had once sat through a criminal jury trial.

The court advised him that an experienced public defender would be appointed and recommended that he not represent himself. The court also told him that he was making a mistake, and that he was being granted pro per status with great reluctance. A written form detailing the problems with waiving counsel was read to defendant, and he was questioned about it in open court.

Defendant was also told that he could change his mind 'in the near future; that is, within a week,' and accept appointed counsel, but that if he changed his mind on the day of trial or during trial, the court would not delay the proceedings to appoint counsel.

On September 14, 1981, when the case was called for motions and trial, defendant moved, on the

basis of a written motion he had filed, for appointment of co-counsel, and the court informed him that he had a right to appointed counsel, but not to co-counsel. Defendant also moved again orally to appoint a private attorney, but not the public defender, with the allegation that the public defender had represented the victim and a confidential informant before. The court denied defendant's motion for appointment of co-counsel and ruled that because it was made one day before trial, defendant's request for appointment of counsel was made too late.

On September 15, 1981, defendant told the judge that he wanted counsel appointed because he was incompetent to represent himself. He also requested a continuance. The court denied defendant's request for a continuance because it was his fifth continuance; defendant had failed to make diligent use of his appointed investigator; and the victim's two children had already been

flown in from New York as witnesses. The court then denied the motion for appointed counsel on the ground that the motion was untimely and had been made for purposes of further delay when all other methods of delay had failed.

Jury selection then began.

The record of September 15, 1981, reflects that defendant was not present for all of the jury selection. The minute order states that defendant was removed "at his own request and with the court's order in that the defendant continues to disrupt the proceedings."

The record reflects that on the morning of September 16, 1981, while defendant was still absent, the court appointed an attorney solely to advise defendant about jury voir dire and to urge him to attend the trial. That attorney performed that function, but did not appear again in this proceeding.

Defendant returned to court for part of the

jury selection. Out of the presence of the jury, the court advised defendant that he would not be forced to attend the trial. Defendant said that he had never intended to waive his right to appointed counsel and again stated that he requested to be represented by a lawyer. He was physically removed from the courtroom, later that morning, while jury selection continued. The trial court said that he had been removed for "disrupting the jury."

Defendant was brought back to the courtroom after the jury had been sworn.

The court advised defendant as follows:

"As indicated, you are entitled to represent yourself throughout the course of trial, should you desire. If you start making statements, disrupting the trial, the court will have to have you removed. The court will not physically force you to stay in trial. The court will physically remove [sic], though, if you disrupt the course of the trial."

Defendant maintained that he had been trying to

tell the court that he was not competent to represent himself when he had been removed.

Also on the morning of September 16, 1981, when defendant was given the opportunity to make an opening statement, he again stated that he was not competent to represent himself, and the court told him that he would be removed unless he confined his statement to the evidence. Defendant did not so confine his statement and was again removed from the courtroom.[1]

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1. The following colloquy took place:

"THE COURT: Mr. Carroll, you have the opportunity to make an opening statement, which would mean what you would expect any witnesses to testify to. [¶] "THE DEFENDANT: Your Honor, I would try. I will attempt. First of all, I would like for the jury to know that I am not competent to represent myself. My motion to relieve myself as counsel was timely made. [¶] "THE COURT: All

For the remainder of the morning of September 16, 1981, Dr. Sharon I. Schnittker, deputy medical

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right. Mr. Carroll, we are going to have to remove you from the courtroom. You have the opportunity to make an opening statement. But you cannot tell the jury something that is irrelevant and does not relate to the evidence. [¶] "THE DEFENDANT: May the record reflect that the defendant is being physically removed from the courtroom. [¶] "THE COURT: You will not be physically removed, if you wish to make a proper opening statement to the jury. But you are not going to make a statement on something that is completely irrelevant to the charge. [¶] "THE DEFENDANT: May the record reflect that the defendant has been excused by the judge. [¶] "THE COURT: Not necessarily. The court says you can make an opening statement. But you only make an opening statement as to the evidence. You do not make it on the basis of

examiner, testified to her findings as to the cause of victim's death, with defendant absent. At the

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something that's irrelevant to the charge. If you start again to read something that's irrelevant, the court will have to remove you. Because this trial has to proceed. You used every possible means to delay the trial. You still are doing so. Now, if you wish to make an opening statement, that you may. But if you start making a statement, something that's not relevant to the charge, then, in that event, the court will have to have you physically removed. [¶] "THE DEFENDANT: Your Honor, I would like for the jury to know that the defendant was never served any papers as to what time this person died. A date or anything of this. [¶] "THE COURT: Would you please remove the defendant. [¶] "THE DEFENDANT: And I wasn't even in town at the time. I was out of town. And I don't know anything about it. May the record

beginning of the afternoon session, defendant was brought back into the courtroom. Out of the presence of the jury, the court again advised defendant that he had a right to be present. Dr. Schnittker testified further, and when defendant was offered an opportunity to question her, defendant again announced that he wanted a court-appointed attorney and was removed.[2/]

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reflect that defendant is being physically removed from the courtroom. [¶] "THE COURT: The record will so indicate, with pleasure."

2. The record reflects the following colloquy:

"THE DEFENDANT: Due to my lack of understanding of legal terms, I was not aware — I was not asked to give up my pro per status to be fully represented by court-appointed attorney and — [¶] "THE COURT: Mr. Carroll, the court will have to remove you if — [¶] "THE DEFENDANT: I was not allowed to — [¶] "THE COURT: Please

In defendant's absence, the neighbor who had discovered the corpse testified that defendant had lived in the apartment; he described the discovery of the body. He was not cross-examined, because defendant was still out of the courtroom.

Defendant was also absent while the victim's son testified, but defendant was brought into the courtroom so that the son could identify him. While defendant was in the courtroom, the court asked him whether he wanted to cross-examine the witness. Defendant declined on the ground that he was not competent to represent himself. He also declined, on that ground, to cross-examine the victim's daughter, even though he had returned to the courtroom for her testimony.

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remove Mr. Carroll. [¶] "THE DEFENDANT: May the record reflect that the defendant is being physically removed from the court. [¶] "THE COURT: The record will so reflect."

For the remainder of the trial, defendant remained in the courtroom and cross-examined the other witnesses, including the police officer who was called to the scene, a police criminalist, a police homicide detail officer, and defendant's former cellmate. During cross-examination of these witnesses, defendant said that he was incompetent to represent himself and had asked for counsel or co-counsel to be appointed.

Defendant moved during the defense case to have another inmate of the county jail appointed as co-counsel, and this motion was denied, outside the presence of the jury.

As part of defendant's case, he moved to call the trial judge as a witness, but that motion was denied after a hearing before another judge. Defendant called jail inmates to the stand in an attempt to elicit testimony that he had never told these witnesses that he had committed the crime. He called various prosecution witnesses, including

Dr. Schnittker, the medical examiner. He also called the police criminalist, the homicide officer, and Walter Carroll. Defendant made his argument before the jury, and the jury returned its verdict of guilty. On October 16, 1981, defendant's motion to have counsel appointed for the sentencing hearing was denied.

DISCUSSION

In this case, excluding defendant from the courtroom meant that certain parts of the People's case proceeded without the presence of the defendant, or counsel for the defense. Such a situation offends the most fundamental idea of due process of law, as defendant is totally deprived of presence at trial and even of knowledge of what has taken place. Because defendant represented himself, his removal from the courtroom deprived him not only of his own presence, but of legal representation.

"The right of an accused in a criminal trial to

due process is, in essence, the right to a fair opportunity to defend against the State's accusations. The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process. Mr. Justice Black, writing for the Court in In re Oliver (1948) 33 U.S. 257, 273, [92 L.Ed. 682, 68 S.Ct. 499], identified these rights as among the minimum essentials of a fair trial:

> 'A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense -- a right to his day in court -- are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.'"

(Chambers v. Mississippi (1973) 410 U.S. 284, 294 [35 L.Ed.2d 297, 93 S.Ct. 1038].)

The right to counsel at trial is such that its absolute denial cannot be deemed harmless error. In Gideon v. Wainwright (1963) 372 U.S. 335 [9 L.Ed.2d 799, 83 S.Ct. 792], there was no consideration of whether denial of appointed counsel to an indigent felony defendant had been prejudicial to defendant's case, only a holding that such denial required reversal.

It has also been held that the right to assistance of counsel is one of the rights of due process which are necessary to insure the fundamental human rights to life and liberty. If this safeguard is not provided, justice cannot be done. The State is without the power and authority to deprive an accused of life and liberty unless he has or waives assistance of counsel, and provision of the right to counsel, or waiver thereof, is an essential jurisdictional prerequisite to the

authority to convict an accused. Conviction without this safeguard is void. (Johnson v. Zerbst (1937) 304 U.S. 458 [82 L.Ed. 1461, 58 S.Ct. 1019].)

In Chapman v. California (1967) 386 U.S. 18, 23 footnote 8, [17 L.Ed.2d 705, 87 S.Ct. 824], the Supreme Court noted that denial of the constitutional right to counsel can never be deemed harmless error but, rather, requires reversal of the conviction. (See People v. Holland (1978) 23 Cal.3d 77, 8[illegible].)

In Faretta v. California (1974) 422 U.S. 806 [45 L.Ed.2d 562, 95 S.Ct. 2525], the United States Supreme Court held that the right to assistance of counsel guaranteed by the Sixth and Fourteenth Amendments to the federal constitution includes the right of an accused to represent himself at trial when he voluntarily and intelligently elects to do so. The refusal of the California trial court to permit Mr. Faretta to represent himself at trial

was held to require vacation of the judgment, without regard to whether defendant had been prejudiced in the outcome of the trial.

From the above cases, we must conclude that, under the circumstances of our case, the involuntary exclusion from the courtroom of a defendant who was representing himself, without other defense counsel present, was fundamental error requiring reversal without regard to prejudice.

We do not intend, with this opinion, to put into the hands of defendants a tool by which they can exercise their rights under Faretta v. California, supra, 422 U.S. 806, to represent themselves and then become disruptive, securing their exclusion from the courtroom and automatic reversal. Other alternatives exist. The trial court may, for example, find that defendant is no longer able to represent himself and appoint counsel. It has been suggested that contempt

proceedings may be taken against a defendant in a proper case, or that a defendant may remain in the courtroom under some restraint. (See Illinois v. Allen (1970) 397 U.S. 337, 344 [25 L.Ed.2d 353, 90 S.Ct. 1057].) In the present case, no alternative other than excluding defendant was attempted.[3/]

In Faretta, supra, the court made these comments, in a footnote, upon the possible problems with the right to self-representation which it had announced that day:

> "We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by

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3. In People v. McKenzie, Crim. No. 22615, a related issue is currently pending before this state's Supreme Court.

federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. See Illinois v. Allen, 397 U.S. 337. Of course, a State may--even over objections by the accused--appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. See United States v. Dougherty, 154 U.S. App.D.C. 76, 87-89, 473 F.2d 1113, 1124-1126."

"The right of self-representation is

not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"

(Faretta v. California, supra, 422 U.S. 806, 834-835, fn. 46.)

We do not base our holding in this case on error by the trial court in deciding that this defendant's behavior merited his exclusion from the courtroom.

A defendant who is represented by counsel may be excluded from the courtroom for disorderly or disruptive behavior, or, in a trial for an offense

not punishable by death, the trial may continue if defendant is voluntarily absent. (See Penal Code § 1043.)[4/]

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4. Penal Code section 1043 provides, in pertinent part, as follows:

> "(a) Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial.
>
> "(b) The absence of the defendant in a felony case after the trial has commenced in his presence shall not prevent continuing the trial to, and including, the return of the verdict in any of the following cases:
>
> "(1) Any case in which the defendant, after he has been warned by the judge that he will be removed

It has been held that a defendant may waive his constitutional right to confront witnesses by

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if he continues his disruptive behavior, nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that the trial cannot be carried on with him in the courtroom.

"(2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.

"(c) Any defendant who is absent from trial pursuant to paragraph (1) of subdivision (b) may reclaim his right to be present at the trial as soon as he is willing to conduct himself consistently with the

disruptive conduct in the courtroom. (See Illinois v. Allen, supra, 397 U.S. 337; People v. Booker (1977) 69 Cal.App.3d 654.) However, these cases have involved defendants who exhibited violently disruptive conduct and who continued to have defense counsel present while they were excluded from the courtroom.

In the present case, defendant does not appear to have engaged in violent conduct. Although his repeated statements that he was incompetent to represent himself were, undoubtedly, annoying, provocative, and somewhat disruptive, there is no indication that it was impossible to proceed with the trial as a result. It was error to exclude defendant under the circumstances.

If defendant Carroll had not been acting as his

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decorum and respect inherent in the concept of courts and judicial proceedings."

own counsel, we would, nevertheless, find that the error in excluding him was harmless beyond a reasonable doubt, given the overwhelming case against him. (See Chapman v. California, supra, 386 U.S. 18.) However, as we have previously discussed, excluding him as a defendant representing himself was a fundamental error requiring reversal, because there was, then, no defense counsel present.

Nor do we base our decision in this case on error in denying defendant's belated request for appointed counsel. Once a defendant has proceeded to trial representing himself, it is within the sound discretion of the trial court whether he may later give up the right to self-representation and assert the right to appointment of counsel. People v. Elliott (1977) 70 Cal.App.3d 984, 991.

Relevant facts in considering whether defendant should be allowed to assert the right to counsel after trial has begun include the following:

"(1) Defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth for the request, (3) the length and stage of the trial proceedings, (4) disruption or delay which reasonably might be expected to ensue from the granting of such motion, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney." (Id. at p. 993.) The trial court must make a record based on these factors and then exercise its discretion and rule on defendant's request. (Id. at p. 994.) However, we also do not base our reversal on any error in making a record as to this aspect of the case.

Any error related to denial of the belated request for counsel would have been found harmless beyond a reasonable doubt. (See Chapman v. California, supra, 386 U.S. 18.)

We base our holding on the fundamental error in the present case in excluding a defendant acting as his own counsel from the courtroom without the presence of counsel for the defense, where, as here, defendant's annoying activity amounted to no more than a repeated insistence on appointment of counsel.

Our holding today does not extend to cases where defendant clearly chooses to represent himself and then clearly, voluntarily, and on the record, refuses to participate in his trial. We limit our holding to only those situations in which a defendant has chosen to represent himself and

* * * * * *

then is removed from the courtroom, involuntarily, while the trial continues in his absence, without counsel present.

DISPOSITION

The judgment is reversed, and the case is remanded for retrial.

CERTIFIED FOR PUBLICATION

DANIELSON, J.

We concur:

KLEIN, P. J.

LUI, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | | |
|---|---|---|
| THE PEOPLE, | ) | 2 Crim. No. 41330 |
| | ) | |
| Plaintiff and | ) | (L.A.S.C. Super. Ct. No. |
| Respondent, | ) | A-022036) |
| | ) | |
| v. | ) | O R D E R |
| | ) | |
| JOHN WALTER CARROLL, | ) | COURT OF APPEAL-SECOND DIST. |
| | ) | |
| Defendant and | ) | FILED MAR. 21, 1983 |
| Appellant. | ) | |
| | ) | CLAY ROBBINS, JR. Clerk |

Deputy Clerk

THE COURT:

The petition for rehearing filed on March 3, 1983, is DENIED.

CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.
Witness my hand and the seal of the Court this 3d day of May A.D.,1983
CLAY ROBBINS, JR., Clerk

By R. A. Albiston
Deputy Clerk

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

2nd District, Division 3, Crim. No. 41330

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

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SUPREME COURT
F I L E D
Apr. 20, 1983
Laurence P. Gill, Clerk

PEOPLE

v.

JOHN WALTER CARROLL

Deputy

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Respondent's petition for hearing DENIED.

BIRD
Chief Justice

I, Laurence P. Gill, Clerk of the Supreme Court of the Supreme Court of the State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 10th day of May A.D. 1983

Clerk

By R. Johnson
Deputy Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

| | |
|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOHN WALTER CARROLL, Defendant and Appellant. | 2 Crim. No. 41330<br>A-022036<br><br>COURT OF APPEAL-SECOND DIST.<br><br>FILED MAY 3, 1983<br><br>CLAY ROBBINS, JR. Clerk<br><br>Deputy Clerk |

ORDER

GOOD CAUSE APPEARING, it is ordered that the remittitur in this case be recalled and thereafter stayed and the execution and enforcement of the judgment of this Court deferred/for a period of sixty days to permit the filing by the People of the State of California of a petition for writ of certiorari with the Supreme Court of the United States and that upon the filing of said petition, the stay and order deferring

execution and enforcement of judgment remain in force until final determination of the proceeding in the Supreme Court of the United States.

DATED:

LUI
ACTING PRESIDING JUSTICE

CLAY ROBBINS, JR., Clerk of the Court of Appeal, Second Appellate District, State of California, do hereby certify that the preceding is a true copy of an order of this Court, as shown by the records of my office.

Witness my hand and the seal of the Court this 3d day of May A.D.,1983

CLAY ROBBINS, JR., Clerk

By R. A. Albiston
Deputy Clerk

HJS:dlc
LA81DA1619
4/29/83

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982
No. 82-1923

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STATE OF CALIFORNIA,

Petitioner,

v.

JOHN WALTER CARROLL,

Respondent.

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# BRIEF OF RESPONDENT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982
No. 82-1923

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STATE OF CALIFORNIA,
Petitioner,

v.

JOHN WALTER CARROLL,
Respondent.

---

# BRIEF OF RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

The opinion of the California Court of Appeal is published and reported as 140 Cal.App.3d 135, 189 Cal.Rptr. 327 (filed February 23, 1983). On April 20, 1983, the California Supreme Court denied a timely petition for hearing filed by the State of California. The order denying the petition for hearing is unreported. Copies of the

California Court of Appeal opinion and the order of the California Supreme Court denying the petition for hearing are attached to the petition for writ of certiorari as appendices A and C respectively.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amendment VI, provides in relevant part:

"In all criminal prosecutions, the accused shall enjoy the right to . . . to have the assistance of counsel for his defense."

United States Constitution, amendment XIV, section 1, provides in relevant part:

". . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . . ."

## STATEMENT OF THE CASE

Respondent John Walter Carroll was convicted of first degree murder in a California superior court after a jury trial. The California Court of Appeal has reversed that conviction and ordered a new trial.

Respondent Carroll was granted the right to represent himself in this first degree murder case. (RT 17-A, lines 12-16.) After the jury was sworn, the judge who presided at the trial admonished respondent Carroll in the following words:

> "As indicated, you are entitled to represent yourself throughout the course of the trial, should you desire. If you start making statements, disrupting the trial, the court will have to have you removed. The court will not physically force you to stay in

trial. The court will physically remove, though, if you disrupt the course of the trial." (RT 90.)

After hearing these remarks, respondent Carroll said that he felt he was not competent to represent himself and asked that the court ". . . appoint to the defendant a court-appointed attorney." (RT 90.) The court did not respond to this request. (RT 90-91.)

The prosecutor made his opening statement to the jury. Then the court told respondent Carroll that he had an opportunity to make an opening statement, ". . . which would mean what you would expect any witnesses to testify to." (RT 91.) Respondent Carroll replied as follows in the presence of the jury:

"THE DEFENDANT: Your Honor, I would try. I will attempt.

"First of all, I would like for the jury to know that I am not competent to represent myself. My motion to relieve myself as counsel was timely made." (RT 91, lines 25-28.)

Rather than warning the defendant that such comments were not within the scope of a proper opening statement and admonishing the jury to disregard them, the court immediately reacted by stating: "Mr. Carroll, we are going to have to remove you from the courtroom. You have the opportunity to make an opening statement. But you cannot tell the jury something that is irrelevant and does not relate to the evidence." (RT 92, lines 2-5.)

When respondent Carroll asked that the record reflect that he was being physically removed from the courtroom, the court

relented that he would not be removed if he wished to make a proper opening statement. The court did not ever explain the proper way to make an opening statement to this lay defendant, but ambiguously said that he could not make it on the basis of "something that's irrelevant to the charge." The court concluded his remarks by stating respondent Carroll could make an opening statement, but that ". . . if you start making a statement, something that's not relevant to the charge, then, in that event, the court will have to have you physically removed." (RT 92.) Respondent Carroll responded to the judge that he would like the jury to know that he, the defendant, was never served any papers as to what time this person [presumably the victim] died. (Id.)

This remark triggered the court's request to the bailiff to remove respondent

Carroll from the courtroom. Respondent Carroll blurted out that he was not in town at the time and that he did not know "anything about it." Respondent Carroll asked that the record reflect that he was being physically removed from the courtroom. The court replied that "The record will so indicate with pleasure." (RT 93.)

The trial then proceeded in the complete absence of respondent Carroll or of anyone representing him in his absence. Sharon I. Schnittker, the deputy medical examiner-coroner, was examined as to her findings in the absence of respondent Carroll during the remainder of the session held on the morning of September 16, 1981. (RT 93-121.) Respondent Carroll was brought to the courtroom at 1:40 p.m. that day where he was told that the coroner was testifying, and the court told him that he could remain to

listen to testimony and ask questions. Respondent Carroll was also told that he could present witnesses on his own behalf. Respondent Carroll again stated that he was a layman and was not competent to represent himself. (RT 122.)

Respondent Carroll remained in the courtroom for the remaining three questions and answers of the prosecutor's direct examination of the deputy medical examiner-coroner. (RT 125, lines 1-15.) The court then told respondent Carroll that he might cross-examine this witness (the bulk of whose direct examination he had not heard). At this point, respondent Carroll uttered the following incomplete remark:

> "THE DEFENDANT: Due to my lack of understanding of legal terms, I was not aware -- I was not asked to give up my pro per status to be

fully represented by court-appointed attorney and --" (RT 125.)

If this incomplete sentence was an objection, the court never allowed it to be fully expressed. The following colloquy ensued:

"THE COURT: Mr. Carroll, the court will have to remove you if --

"THE DEFENDANT: I was not allowed to --

"THE COURT: Please remove Mr. Carroll.

"THE DEFENDANT: May the record reflect that the defendant is being physically removed from the court.

"THE COURT: The record will so reflect.

"(Defendant leaves the courtroom.)" (RT 125.)

The deputy medical examiner-coroner was then excused without any cross-examination by the defendant. (RT 126.) The right to physical presence in the courtroom and to cross-examine this witness was forfeited because of the incomplete sentences uttered by Mr. Carroll in the quotations set forth immediately above. Of course, since respondent Carroll was representing himself, the defense could not meaningfully respond to testimony which respondent Carroll had not heard. Nor was there really any way to cross-examine even witness Schnittker when he had not heard her complete direct examination. During the period of respondent Carroll's removal from the courtroom, the trial was a travesty of a fair trial because the defense was wholly absent. There was no adversary in the courtroom to protect respondent Carroll's interests.

Respondent Carroll remained outside the courtroom pursuant to court order during the entire testimony of witness Alfredo Walltower. (RT 126-131.) Witness Walltower was excused without any cross-examination. Walltower established that respondent Carroll lived with the victim in the apartment where her body was discovered; he also recounted the circumstances leading to the discovery of her body. Id.

Respondent Carroll was also outside the courtroom for most of the testimony of 11-year-old John Allan Rupe, a key prosecution witness who testified to respondent's having beaten the victim and to respondent's likely being the last person to see her alive. Respondent Carroll was only brought to the courtroom so that young John could identify Carroll in front of the jury. (RT 153, lines 11-24.) Although respondent

Carroll had been outside of the courtroom during John Rupe's testimony and thus could not have heard anything other than the in-court identification, the court nevertheless tendered the right to cross-examine with these limitations:

> "Mr. Carroll, you are present in court. You have the right to ask this witness some questions, if you desire. But you must limit your inquiries to the case at hand and to what this witness may or may not have seen." (RT 153-154.)

Respondent Carroll replied, "Your Honor, I don't know what to ask this witness. I am not competent to represent myself." (RT 154.) When respondent Carroll repeated this remark, the court excused witness John Rupe without cross-examination. Id. How even a competent trial lawyer could cross-examine a

witness whose testimony he has not heard is the unanswered question in this case. The gesture of offering to let a defendant ask questions is meaningless if he has not heard what the witness has said, particularly so when this trial judge has admonished that he will not tolerate questions beyond what the witness may or may not have seen. If the defendant has not heard direct testimony, how can he hope to stay within these boundaries?

In an nutshell then, respondent Carroll exercised his right to represent himself at trial and, during the People's case, was, from time to time, excluded from the courtroom by court order which the trial court considered unacceptable. During these periods of absence, no defense counsel was present nor did Carroll have access to the proceedings by any electronic means. When so excluded, Carroll could neither see nor hear

what was transpiring in the courtroom.

The California Court of Appeal has held that "Proceeding with trial, under the circumstances of this case, in the total absence of the defendant or counsel for the defense was error. The kind of error which occurred in this case was so fundamental that it goes to the essence of a fair trial." People v. Carroll, 140 Cal.App.3d 135, 136-137 (1983).

## REASONS WHY THIS CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

### I

### THE CALIFORNIA COURT OF APPEAL HAS CORRECTLY FOLLOWED THE DECISIONS OF THIS COURT

In footnote 46 of Faretta v. California, 422 U.S. 806, 834-835 (1974), this Court stated:

"We are told that many criminal defendants representing themselves may use the courtroom for deliberate disruption of their trials. But the right of self-representation has been recognized from our beginnings by federal law and by most of the States, and no such result has thereby occurred. Moreover, the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist conduct. See Illinois v. Allen 397 U.S. 337. Of course, a State may--even over objections by the

accused--appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. . . ."

Faretta was therefore controlling in this case, and the California Court of Appeal properly followed Faretta. If respondent Carroll's conduct was disruptive, then the trial judge should have terminated his right of self-representation and appointed counsel rather than excluding Carroll from courtroom and proceeding in the absence of Carroll or any one appearing on behalf of the defense.

Illinois v. Allen, 397 U.S. 337 (1970), clearly does not stand for the proposition that a defendant representing himself may be excluded from his trial and, in effect, be tried in absentia without the presence of

counsel to represent his interest. In Illinois v. Allen, this Court's opinion reflects the presence of counsel during all portions of the trial when Allen was excluded from the courtroom. Id. at 339-342.

II

RESPONDENT CARROLL'S CONDUCT DID NOT JUSTIFY HIS EXCLUSION FROM THE COURTROOM UNDER ILLINOIS V. ALLEN CRITERIA

Illinois v. Allen, supra, 397 U.S. 337, does not authorize the removal of a defendant from the courtroom for simple misconduct, such as failure to make opening statement that merely summarizes the evidence or failure to be knowledgeable of evidentiary rules which a lawyer might know. Allen was handed down with the extreme case of courtroom disruption in mind.

The instant case was not such an extreme case. In this case, the defendant was excluded initially for making statements to

the jury which were not proper in an opening statement. A simple curative instruction to the jury would have handled the situation, rather than exclusion from the courtroom. When respondent Carroll was excluded the second time, it is apparent that he was attempting to articulate an objection about continued enforcement of his decision to represent himself. The court did not even hear him out; instead respondent Carroll was excluded "with pleasure."

Even if Carroll had not been representing himself, his conduct was insufficient to justify his exclusion from the courtroom. There is simply no evidence in this record to suggest that Carroll's conduct was significantly disruptive. Respondent Carroll's conduct was tame when compared to the conduct of the defendant in Illinois v. Allen.

In short, respondent Carroll should not have been excluded from the courtroom at all in this case because his conduct was not disruptive enough to warrant that extreme sanction. The trial judge in this case overreacted. He figuratively used a cannon to swat a fly.

## CONCLUSION

For the foregoing reasons, respondent Carroll urges that the petition for writ of certiorari be denied.

Respectfully submitted,

RUSSELL IUNGERICH
Attorney for Respondent
JOHN WALTER CARROLL

RI:dl
6-10-83

PROOF OF SERVICE

I am a citizen of the United States, over the age of 1
years, employed in the County of Los Angeles, and not a party to th
within action; my business address is, 205 South Broadway, Suit
808, Los Angeles, CA 90012. I am employed by a member of the bar o
this court.

On _____, I served the within

BRIEF OF RESPONDENT IN OPPOSITION

in said action, by placing a true copy thereof addressed as follows
and delivered the same to Michael Buter Attorney Service for hand
delivery.

John K. Van de Kamp, Attorney General
Howard Schwab, Deputy Attorney General
3580 Wilshire Blvd., Rm. 800
Los Angeles, CA 90010

I declare under penalty of perjury that the foregoing is
true and correct.

Executed this ____ day of _____, 19 ___, at Los
Angeles, California.

_____
Debi Ludvickson